IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 711 OF 2004.

Parvez M. Yusuf,
Age 50 years of Mumbai,
Indian Inhabitant, residing
at 123-127, Mohd.Umar Kokil
Marg (Nishapada), "B" Ward,
Mandvi, Mumbai 400 003. .... Appellant.

Versus.

1. Municipal Corporation of Gr.
   Mumbai, a Corporation formed
   under the provisions of Mumbai
   Municipal Corporation Act,1888
   having its address at Mahapalika
   Bhavan, Mahapalika Marg,
   Mumbai 400 001.

2. Executive Engineer,
   (Building Proposals) City-I,
   Municipal Corporation of Gr.
   Mumbai, Bycullam Mumbai 400 008. .... Respondents.

Shri J.Reis with Shri Y.M.Chaudhari for the Appellant.

Shri K.K.Singhvi with Ms.Vidhya Khatu for the Respondents.

CORAM : ABHAY S. OKA, J.

DATED : 13th April, 2005.

ORAL JUDGMENT.

1. I have extensively heard the Counsel appearing for the parties. The Appeal is by the unsuccessful Plaintiff. Notice of Motion taken out by the Plaintiff for temporary injunction has been dismissed by the trial

Court. The allegation against the Appellant/ Plaintiff is that he has carried out illegal construction of 4th floor and illegal construction of a mezzanine floor above the ground floor and that he has covered the open terrace on the third floor. Accordingly a Notice under section 53(1) of the Maharashtra Regional and Town Planning Act, 1966 was issued by the Respondent-Corporation.

2. The Appellant/Plaintiff filed a suit for challenging the said notice. It will be necessary to refer to the averments made in the plaint. The description of the building in question as stated in the plaint is "123-127, Mohd.Umar Kokil Marg (Nishanpada), "B" Ward, Mandvi, Mumbai 400 003". It is stated that the said building was owned by one Eastern Stores and Trading Co.Pvt.Ltd. and there were notices issued to the said company by the Respondent-Corporation. Reliance is placed on the various notices issued by the Respondent-Corporation by annexing copies of the same to the plaint. A specific case is made out that an application was made for grant of repairs and renovation to the said building by the Appellants. The case of the Appellant/Plaintiff is that after scrutinising the application, the Respondent-Corporation issued IOD dated

1st July 2002. It is the case of the Appellant that compliance was made with the conditions of IOD and accordingly the work of renovation and construction was completed by the Appellant/Plaintiff. The Prayer in the suit is for declaration that the Notice dated 7th January 2004 issued under section 53(1) of the said Act of 1966 is illegal.

3. The Respondent-Corporation filed an affidavit-in-reply for contesting the Notice of Motion taken out by the Appellant/Plaintiff for temporary injunction. The reply is filed by a Sub-Engineer of the Respondent-Corporation. In the said reply it is stated that the proposal for reconstruction of the suit building was received through M/s.Zoeb A.Bootwala and Associates, Architects, and IOD and commencement certificate was issued. It is stated that the original file containing the original proposal was not traceable in the office of the Respondents and therefore, the said Architect was called upon to submit the entire sanction papers in duplicate and accordingly the Architects submitted the entire sanction papers. It is stated in the affidavit-in-reply that while carrying out the construction on the basis of the said permission, the Appellant carried out unauthorised construction of

entire mezzanine floor above the ground floor. It is alleged that he has covered the open terrace of the 3rd floor and he has made construction of fourth floor. Apart from that, it is stated that there is an encroachment made on the passage of the rear side of the building and the compulsory open spaces have been covered. It is stated in the affidavit-in-reply that on 3rd March 2004 a letter was issued by the Respondent-Corporation to the Architects inviting their attention to the unauthorised construction. The Architects appointed by the Appellant/Plaintiff submitted a reply to the Corporation admitting that the Appellant/Plaintiff has carried out the work beyond the approved plan. The Respondent-Corporation has denied the contention of the Appellant that the suit building was in existence prior to the year 1961-62.

4. The learned trial Judge noted the submission made by the Advocate appearing for the Respondent-Corporation that the entire file and papers pertaining to the proposal in respect of the suit building were missing. Therefore, the Respondent-Corporation placed on record a true copy of the sanctioned plan which was supplied by the Architects of the Appellant on the request made by the Respondent-Corporation. Another copy of the alleged

sanctioned plan was also placed on record by the Appellant/Plaintiff. The learned trial Judge held that in the plan produced by the Respondent-Corporation the disputed construction was not shown and the copy of the alleged sanctioned plan produced by the Appellant/Plaintiff showed that the disputed construction was part of it. The Respondent-Corporation expressed helplessness to produce any other document on record. The learned trial Judge referred to the letter sent by the Architects of the Appellant in which it was admitted that the construction has been carried out beyond the sanctioned plan. The learned trial Judge noted that primafacie there was some interpolation in the copy of the notice dated 29th November 1991 placed on record by the Appellants. After considering the documents which are placed on record, the learned trial Judge came to the conclusion that the copy of the plan which is produced by the Appellant/Plaintiff was suspicious. The learned trial Judge, therefore, did not accept the case made out by the Appellant/Plaintiff and dismissed the Notice of Motion.

5. This Appeal from Order was heard before learned Single Judge of this Court on 31st August 2004. The learned Single Judge of this Court noted the submission

made by the learned Advocate appearing for the Respondent-Corporation that the relevant files were missing from the office of the Respondent-Corporation. Therefore, this Court directed the Commissioner of the Respondent-Corporation to look into the matter and to file an affidavit clarifying the correct position. This Court also called for the records and proceedings of the suit from the trial Court.

6. In compliance with the order passed by this Court Shri Johny Joseph, the Municipal Commissioner of the Respondent-Corporation has filed a detailed affidavit. He has placed on record various steps taken for the purpose of tracing out the original files. He has also placed on record that a circular will be issued to all the Heads of the Departments to take due cognizance of cases where action papers or records are reported as missing or lost. He stated that in all such cases an officer not below the rank of Head of the Department shall examine the affidavit before filing the affidavit in the Court of law. In paragraph 5 of the said affidavit, the Commissioner has stated thus:

> "5. I say that the procedure followed in Building Proposal Department is as follows. I

> say that every Architect submits five sets of plan while submitting the proposal for development. After approval of the plan, original is retained with the Building Proposal Department, the one set of plan is given to Architect, another to owner, one set to Water Department, one set to Assessment Department and one set to Assistant Commissioner of the concerned Ward. I say that before filing any affidavit or making any statement before the Hon’ble Court, it was necessary to bring the fact of missing file to the notice of the Head of the Department. I have directed to take diligent search of the set of approved plan is procured from A.E.(W.W.) Department. On comparing the copy of plan submitted by Appellant before the Court with the set of approved plan procured by A.E.(Water Works) "B" Ward it is observed that the copy of plan submitted by the Appellant does not tally with the plan approved by Corporation."

7. When the Appeal was called out before me on 11th March 2005, I invited the attention of the learned Advocate appearing for the Respondent-Corporation to the

statement made by the Commissioner in paragraph 5. At that time, the Advocate for the Respondent-Corporation produced one set of approved plans which was available with the A.E. (Water Works). Inspection of the said plan was given to the Counsel appearing for the Appellant and to the Appellant. The said plan bears the stamp of approval of the concerned officer of the Respondent-Corporation. Apart from this fact, the said plan bears the signature of the Appellant. After showing the said plan to the Appellant who was stated to be present in Court the learned Counsel appearing for the Appellant stated that the plan bears his signature. It is pertinent to note that the affidavit of the Commissioner is dated 3rd September 2004 which is filed in this Court on 6th September 2004. Till today there is no reply filed by the Appellant to the said affidavit. The Commissioner has stated in paragraph 5 of the said affidavit that as per the procedure followed by the Building Proposal Department, the Architect is required to submit five sets of plan while submitting the proposal for development. After approval of the plan, the original is retained in the Building Proposal Department, one set of plan is given to the Architect and one set is given to the owner. One set is sent to the Water Department and one to the Assessment

Department. Thus a set of sanctioned plan was found in the Water Department which is produced before this Court. So far as the genuineness of the said plan is concerned, there cannot be dispute as the same bears the signature of the Appellant himself and as noted earlier, the Counsel for the Appellant has stated that the Appellant has admitted his signature on the said plan.

7. The learned Counsel appearing for the Appellant submitted that the trial Court has held that there were two different plans bearing the rubber stamps of the Respondent-Corporation on record and therefore, it was necessary to decide as to which plan was correct. He submitted that considering the fact that two different sets of plan bearing the seal of the Respondent-Corporation are on record, it was obviously a case where there were triable issues and therefore, interim injunction was required to be granted.

8. The learned Counsel appearing for the Respondent-Corporation has taken me through the various documents annexed to the plaint. My attention is invited to the alleged sanctioned plan relied upon by the Appellant. My attention has also been invited to the area calculation made in the said plan and it was

submitted that there is a patent error in the said calculation shown in the plan.

9. I have considered the rival submissions. It is pertinent to note that the case of the Appellant is that one Eastern Stores & Trading Company Pvt.Ltd. were the owners of the said building and the Appellant purchased the same from the said erstwhile owners. It is to be noted here that even the date of conveyance under which the property was purchased by the Appellant is not mentioned in the plaint. A copy of the conveyance is not annexed to the plaint. As stated earlier the suit building bears the Municipal number 123-127 and is situated Mohammed Umar Kokil Marg, "B" Ward, Mandvi, Mumbai-3. The first document relied upon by the Appellant is the notice under section 354 of the Bombay Municipal Corporation Act, 1888 (hereinafter referred to as "the said Act of 1888") addressed by the Respondent-Corporation to the Eastern Stores & Trading Co.Pvt.Ltd. The said notice is in respect of the building bearing No.125/127 situated at Nishan Pada Road Mumbai-9. The reply to the said notice sent by the said company does not refer to the number of the property in respect of which the said reply is sent. The next document is another notice sent under section 354 of the

said Act of 1888 addressed to the said company wherein reference is made to the building situated at No.125/127. The reply to the said notice given by the said company refers to 125, Nishan Pada Road. The same is the case with communication dated 17th October 1994 issued by the Assistant Engineer of the Respondent-Corporation. The said documents are relating to property No.125/127 and therefore, the omission to place on record a copy of the sale deed allegedly executed in favour of the Appellant becomes significant. Suffice it to say at this stage that primafacie the said documents do not relate to the suit premises bearing No.123/125. Reliance is placed on some other correspondence. The said correspondence does not in any manner further the case of the Appellant/Plaintiff. Apart from the aforesaid documents, now what is really relevant is the set of sanctioned plans produced before this Court. Since the said sanctioned plans bear the signature of the appellant, controversy regarding the extent of the construction permitted will have to be treated as settled. The said sanctioned plan bearing the signature of the Appellant and his Architect does not show existence of the offending structure at all. The learned Counsel for the Appellant tried to criticize the role played by the Architects. However, the fact

remains that the said plan which is produced on record was obtained from the Water Department of the Respondent. The set of plan which was obtained from the Architect and the said set of plan on the record of the Water Department are identical. Thus the net conclusion is that the unauthorised construction set out in the impugned Notice under section 53(1) of the said Act of 1966 cannot be tolerated as it is beyond the sanctioned plan.

10. At this stage the learned Counsel appearing for the Appellant submitted that the Appellant may be permitted to apply for regularisation and till the proposal for regularisation is considered action of demolition should not be taken by the Respondent-Corporation. It will be necessary to see the relevant provisions of the said Act of 1966. Sub-Section (3) of section 53 reads thus:

> "(3) Any person aggrieved by such notice may, within the period specified in the notice and in the manner prescribed, apply for permission under section 44 for retention on the land of any building or works or for the continuance of any use of the land, to which the notice

> relates, and pending the final determination or withdrawal of the application, the mere notice itself shall not affect the retention of buildings or works or the continuance of such use."

Sub-Section (3) of section 53 provides that any person aggrieved by such notice may apply for permission under section 44 for retention of the works to which the notice relates and pending final adjudication or withdrawal of the application, the mere notice shall not affect the retention of the building or works or the continuance of such use. The period specified in the notice in question is one month from the date of receipt of the said notice. The plan sanctioned by the Corporation does not permit construction of the structures reflected in the notice under section 53(1). The Appellant was fully aware about the same and he could have applied for regularisation within a period of one month as provided in the statute. However, there is nothing on record to show that he has availed of the said opportunity. The averments made in the plaint show that the notice was served on the Appellant on 7th January 2004 and the suit was filed on 4th March 2004. At this stage it will be necessary to refer to the

decision of the Apex Court dated 16th March 2005 in Civil Appeal No.2733/2734 of 2001 (Mahendra Baburao Mahadik & ors. v/s. Subhash Krishna Kanitkar & ors.). The Apex Court was dealing with a case under the Maharashtra Municipalities Act for regularisation of an unauthorised structure. In the said Judgment, the Supreme Court has observed thus:

> . "Once such a notice under section 52 is served, the persons aggrieved within the period specified therein, which in the instant case is one month, must apply for permission for retention on the land of the building or works under section 44 of the MRTP Act. Only when a permission is granted, the notice would stand withdrawn. The question of grant of any permission would arise only if an application is made therefor. As the Appellants herein had not filed such application, the Municipal Council was obliged not only to prosecute the owner but also to carry out the demolition in terms of the aforementioned notice dated 6.6.1998.
>
> . The Municipal council is a 'local authority' as well as planning authority

within the meaning of the provisions of Section 2(15) and 2(19) of the MRTP Act.

. The Municipal Council being a creature of statute was bound to carry out its functions within the four-corners thereof. Being a statutory authority, it was required to follow the rules scrupulously. Concededly, the Municipal Council is not possessed of any statutory power to regularize unauthorised constructions. Its power is confined to compounding the offences in certain cases. Moreover, even development charges could not be recovered from the Appellant in respect of unauthorized constructions in terms of section 124E(2) of the MRTP Act."

The Apex Court proceeded to observe further as under:

. "The jurisdiction of a local authority is confined only to deal with application for grant of permission for construction as contained in section 44 of the MRTP Act whether at the initial stage or when a notice is served under sub-section (2) of section 53 of the MRTP Act. The power to grant such

> permission could be exercised only within the purview of the Building Bye-laws. Therefore, being beyond the scope of section 44 of the MRTP Act the Municipal Council did not have any jurisdiction to direct regularization of such unauthorized constructions by reason of the said resolution or otherwise. The power of the Municipal Council, it is trite, being confined to the provisions of the said Acts, no action could be taken by them contrary thereto or inconsistent therewith."

It is obvious that the reference to section 52 in the earlier part of the order of the Apex Court is to section 53 of the said Act of 1966. In view of what has been held by the Apex Court the conclusion is inevitable. After having failed to avail of the opportunity to apply for regularisation under section 53(3) of the said Act of 1966, in the the facts of the present case, no protection or relief can be granted in favour of the Appellant to facilitate consideration of his application for regularisation.

11. This is not a case of a bonafide litigant who after knowing that there was an unauthorised construction and

after a notice was received about the same, applied for regularisation. Equitable jurisdiction cannot be exercised in favour of such a litigant. He did not produce true copy of the plan which was sanctioned and tried to mislead the trial Court by producing an altogether different plan. In this view of the matter, there is no substance in the Appeal and the same is dismissed with costs.

12. At this stage the learned Counsel appearing for the Appellant prays that the ad-interim order granted by this Court be extended for a period of six weeks. The said prayer is opposed by the learned Counsel for the Respondents. The Appeal is pending in this Court from August 2004. Considering the fact that notice structure is protected for all this time, it is directed that both the parties will maintain status-quo as of today for a period of one month from today.

Judge.